

HELEN SCHILLER

CUSTOM CAR WASH, INC.

AMERICAN FAMILY MUTUAL INSURANCE CO.

Docket No. 1,005,059

In contrast, respondent requests the Board to affirm the preliminary hearing Order. Respondent argues that claimant failed to prove her right upper extremity problems are related to her work activities while employed by the respondent. Furthermore, respondent contends claimant failed to provide respondent with timely notice that her repetitive work activities through the last day worked of February 15, 2002, were causing her pain and discomfort in her right upper extremity.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the parties' briefs, the Board finds that the preliminary hearing Order should be affirmed.

The Board agrees with the ALJ's findings and conclusions as set forth in the preliminary hearing Order. It is, therefore, not necessary to repeat those findings and conclusions in this Order. The Board adopts those findings and conclusions as its own as if specifically set forth herein.

In particular, the ALJ had the opportunity to observe the claimant, her husband, a fellow employee, and respondent's general manager and partial owner testify in person. Those individuals provided conflicting testimony on both the issue of whether claimant's right upper extremity problems were related to her work activities and whether claimant gave respondent timely notice of accident. In denying claimant's request for medical treatment, the ALJ found claimant not credible. The Board concludes some deference may be given to the ALJ's findings and conclusions because she was able to personally observe and judge the credibility of all of the witnesses. Therefore, the Board concludes for preliminary hearing purposes, the claimant failed to sustain her burden of proving by preponderance of the credible evidence that her right upper extremity problems were related to her work activities while employed by respondent. The Board also concludes claimant failed to prove that she gave respondent timely notice that her work activities through her last day worked of February 15, 2002, were causing injury to her right upper extremity.

Claimant also filed a Motion to Reopen the Evidence before the Board. Claimant's motion requested the Board to consider for the first time on appeal an October 16, 2002, medical record from Atul T. Patel, M.D. as part of the preliminary hearing record. The Board only has jurisdiction to review "...questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge."¹ The subject medical record claimant requests the Board to consider was not a part of the preliminary hearing record before the ALJ. Thus, the Board cannot consider the medical record as part of the preliminary hearing record.

As provided by the act, preliminary hearing findings are not binding but subject to modification on a full hearing on a claim.²

WHEREFORE, it is the finding, decision, and order of the Board that ALJ Julie A.N. Sample's October 8, 2002, preliminary hearing Order, should be, and is hereby, affirmed.

¹ K.S.A. 44-555c(a).

² K.S.A. 44-534a(a)(2).

IT IS SO ORDERED.

Dated this ____ day of December 2002.

BOARD MEMBER

c: Steven J. Borel, Attorney for Claimant
Joseph P. Ebbert, Attorney for Respondent
Julie A.N. Sample, Administrative Law Judge
Director, Division of Workers Compensation